

# Litigating Reproductive and Developmental Health in the Aftermath of *UAW versus Johnson Controls*

by Carin Ann Clauss,<sup>1</sup> Marsha Berzon,<sup>2</sup> and Joan Bertin<sup>3</sup>

In a major decision handed down last term (*International Union [UAW] versus Johnson Controls, Inc.*), the Supreme Court ruled that employment practices excluding fertile or pregnant women from the workplace because of alleged concerns for fetal health constitute illegal sex discrimination. We analyze the three opinions in the case and explain why the decision was an essential first step to promoting reproductive and developmental health in the workplace. Continued progress toward eliminating or reducing reproductive occupational risks will require comprehensive legal strategies involving private lawsuits, governmental regulation and enforcement actions, and new legislation designed to preserve the existing rights of workers and to obtain new and additional protections. Finally, we caution that, in designing such strategies, it will be important to avoid solutions that either shift responsibility for reproductive health to workers, rather than to employers, or that undermine other important legal rights.

## Introduction

On March 20, 1991, the Supreme Court held in *International Union (UAW) versus Johnson Controls, Inc.* (1) that "fetal protection policies," under which employers have excluded fertile or pregnant women from hazardous work sites allegedly to protect an actual or potential fetus, constituted sex discrimination. As such, the Court said, these rules were invalid under Title VII of the Civil Rights Act because the employer could not prove that a woman's fertility or pregnancy interfered with her ability to perform essential work assignments. The Court specifically rejected the employer's argument that it was entitled to bar all fertile women to achieve even such a desirable goal as avoiding fetal risk. Instead, the Court held that employers could not avoid their obligation to maintain acceptable workplace conditions by discriminating against women workers. The plain import of the decision is that employers must protect against fetal harm and employ women on a nondiscriminatory basis.

The initial response in the labor and women's rights communities to the Supreme Court's decision was one of general jubilation (2-4). However, there were some who, while recognizing the importance of the case in establishing equal employment opportunity for women, voiced concern that the Court had not adequately addressed the underlying health issues. The result of this omission, the critics argued, is that the opinion does not protect anyone's health, but simply sanctions equal exposure of women and men to working conditions dangerous to their health and the health of any future offspring (5).

Such explicit criticism of the Court's opinion and implicit criticism of the coalition of labor, women's rights, and public health advocates that litigated the case and articulated the approach ultimately adopted by the Court reflects impatience with the use of the courts as part of—but certainly not all of—any broad, long-term strategy toward greater protection of individuals. Such impatience is understandable but does not fully account for the structure of the legal system through which changes occur. Legal strategies necessarily reflect the limitations of the legal system. That system has a tendency to deal with societal problems in an incremental, subdivided way that can be frustrating to those seeking an immediate, global answer. To work within that system, litigants are constrained to proceed in a measured fashion in structuring their lawsuits and often cannot rely on litigation alone to reach the ultimate goal.

It is, for example, ordinarily not possible to combine in a single lawsuit all aspects of such complex societal prob-

<sup>1</sup>University of Wisconsin Law School, Madison, WI 53706.

<sup>2</sup>American Federation of Labor, San Francisco, CA.

<sup>3</sup>American Civil Liberties Union.

Address reprint requests to C. A. Clauss, University of Wisconsin Law School, Madison, WI 53706.

This manuscript was presented at the Conference on Occupational and Environmental Reproductive Hazards that was held 20-22 November 1991 in Woods Hole, MA.

lems as assuring equal employment opportunity and reproductive health in the workplace. Courts decide only the legal questions presented by the precise dispute before them and do not go beyond those legal questions to express views on different societal issues not squarely raised by the particular cases under consideration. Moreover, courts are usually willing to resolve in a single lawsuit only those aspects of the problem addressed under a particular statute or cause of action; workplace gender equality and workplace safety, for example, are covered by separate Federal statutes and cannot usually be litigated in a single lawsuit. Also, our complicated legal system divides adjudication between state and Federal courts and between agencies and courts; consequently, theories that depend upon state and Federal statutes (such as state and Federal equal employment statutes) or on court-enforced and agency-enforced statutes (such as equal employment and occupational health and safety statutes) often must be litigated separately. Additionally, some statutes (such as the Federal Occupational Safety and Health Act) do not give individuals the right to go to court to assert rights. Instead, under those statutes, the government acts as the enforcer of those rights only if it so chooses, and proponents of progressive actions therefore must persuade government officials to go forward, a task really more akin to lobbying than to litigation.

As a consequence of these legal limitations, *UAW versus Johnson Controls* and the limited issue it decided, was always intended as the first, not the last, in a series of changes in employer and governmental policies ultimately necessary to protect reproductive health in the workplace. The statute in question in *UAW versus Johnson Controls* was Title VII of the 1964 Civil Rights Act (6), a statute that only assures sexual equality and does not otherwise address health issues. Thus, the lawyers in the case could not have raised any health issues directly, although facts concerning the impact of lead on reproductive health and health generally were central to showing that gender-based discrimination was occurring.

The employers' obligation to maintain a workplace free from recognized hazards is set out in the Occupational Safety and Health Act [OSH Act (7)], and only the Department of Labor can bring suit for any breach of that obligation. Nor can lawyers generally bring a personal injury or tort suit against employers for potential injuries resulting from workplace exposures. In the first place, before any such suit could be brought, there would have to be an actual injury, not just the potential for injury. In the second place, most worker compensation statutes bar tort suits by employees. For all these reasons, questions specifically concerning appropriate employer protections of reproductive health were not directly at issue in *UAW versus Johnson Controls*.

Yet, the issue decided in *UAW versus Johnson Controls* was an essential first step to the fair resolution of the occupational safety and health issues and corporate responsibility questions concerning reproductive health generally. Had the Court approved exclusion of women from workplaces entirely because of reproductive dangers, the result would have been characterized by employers as

a total solution to the issue of workplace reproductive hazards. The major cost to women's economic security and the economic security of their families would then have received no weight in corporate decision making, and any attempt to protect both reproductive health and economic security and equality would have been permanently stalled. At the same time, larger occupational health concerns caused by toxics such as lead would have been minimized by industry once fetal injury questions were out of the picture. Thus, the *UAW versus Johnson Controls* litigation, while not the ultimate solution to reproductive health in the workplace, was a necessary building block in reaching that goal. Now that it is completed, the task becomes one of defining and pursuing appropriate legal and policy strategies toward assuring women and men the opportunity to work without endangering their reproductive health and the health of future offspring.

### ***UAW versus Johnson Controls* and Other Title VII Cases**

Because OSHA does not give employees or their representatives the power to enforce the OSH Act and because the Department of Labor, after 1980, refused to take an active role in opposing fetal protection policies, the efforts of employee lawyers focused on Title VII of the Civil Rights Act as the only available remedy for affected women workers. While they succeeded in placing important limits on employers' use of fetal protection policies, none of the court decisions outlawed such policies completely. The Fourth, Fifth, and Eleventh Circuit Courts of Appeals had ruled that such policies could, in limited circumstances, be justified as a "business necessity" (8-10). The Sixth Circuit adopted an even stricter rule, requiring employers to show that the policy could be defended as a "bona fide occupational qualification" (BFOQ), which permits sex discrimination in employment when the sex of the employee is "reasonably necessary to the normal operation" of the business (11). The Seventh Circuit would have allowed such policies to proliferate because it required little in the way of a business justification (12). Only one state court, applying state law, had held that such policies always constitute prohibited sex discrimination (13). Even the Federal agency charged with enforcing Title VII, the Equal Employment Opportunity Commission (EEOC), issued a series of confusing and contradictory guidelines and ultimately refused to invalidate fetal protection policies absolutely (14,15).

### **Importance of the Issue**

By the time *UAW versus Johnson Controls* had reached the Supreme Court, the law governing fetal protection policies was in a state of disarray. The policies had become widespread in many industries (chemical, petrochemical, lead battery, paint, rubber, tire, plastics, computer chip processing). It was estimated that the 15-20 million jobs involving exposure to known or suspected reproductive hazards could be closed to women if fetal protection policies were permitted (16).

The stakes for women in the outcome of *UAW versus Johnson Controls* were thus extraordinarily high. Fetal protection policies threatened to resegment the workplace along gender lines, since such restrictions were most often imposed in traditionally male industries where wages were high and women were perceived as marginal workers (17). In contrast, such policies were rarely applied in traditionally female industries where the risk of toxic exposure was often similar, as, for example, in hospitals, schools, dry cleaning establishments, beauty salons, and day care centers (18). Reinforcing such discriminatory employment patterns would not only limit women's employment opportunities, but the resulting oversupply of workers for the traditionally female occupations would be likely to further depress the wage and benefit levels for those occupations (19).

Some employers and commentators have attempted to justify fetal protection policies as necessary to protect employers from potential ruinous tort liability arising from damages to the offspring of women workers exposed to toxicants. Because a woman worker's child would not be covered by worker compensation statutes, this was said to represent more significant financial exposure than any potential health hazards to the adult worker, who, for the most part, is limited to recovery under the workers compensation system. Reproductive injury to the worker is often not covered under that system. This rationale was less than persuasive because the liability potential was more hypothetical than real and because liability would also extend to the children of male workers.

Other commentators questioned whether such policies even promoted maternal-fetal health because the policies caused women to be unemployed or underemployed. The alternatives most often confronting women workers were either unemployment, employment in equally hazardous female occupations, and/or employment in inferior jobs that provided lower wages and few if any benefits, including health insurance. Obviously, none of these options could be counted on to promote the health of future or current offspring. Indeed, poverty and the lack of adequate prenatal care are strongly correlated with low birth weight and prematurity, the two most common causes of infant morbidity and mortality in the United States.

Fetal protection policies caused other health problems. They promoted surgical sterilizations, even where such procedures were not actively recommended by the employer, since sterilization was often the only way to retain needed employment. Such policies ignored the risk of harm to children of male workers as well as the loss of reproductive function and sexual capacity in male workers. Finally, such policies, by immunizing the employer from any lawsuit outside the worker compensation system, encouraged higher levels of toxic exposure for adult workers, even in situations where it would have been feasible to significantly reduce these exposure levels. This is perhaps best illustrated in the lead industry, where employers proposed an exposure level of 200  $\mu\text{g}/\text{m}^3$  (rather than the 50  $\mu\text{g}/\text{m}^3$  level adopted) if fertile women could be excluded from lead-exposed jobs, arguing that

monitoring employee health would be sufficient to avoid the most serious adverse health effects of lead exposure (20).

## The Case

Johnson Controls justified its policy excluding all fertile women from production jobs, with no automatic age cutoff, in part on the grounds that its earlier voluntary policy had been ineffective in excluding women who subsequently became pregnant. This earlier policy provided in pertinent part that the effect of lead on the adult person is well understood, but when it comes to the effect of lead on an unborn child, we know a lot less. The evidence of any such risk is not as clear as the relationship between cigarette smoking and cancer, but the company feels an obligation to inform women that there is a risk and to recommend that if they wish to have children the risk is high enough to recommend not working at a job in lead exposure. Judge Posner noted in his dissenting opinion in the Seventh Circuit that this policy seemed designed more to "allay concern" than to promote concern (12). Also, at the time of this policy, women were not given salary or job protection when they wished to transfer out of jobs because of reproductive risk.

The record (whether it was complete or not) showed that six workers in 4.5 years had pregnancies while their blood lead levels were, for any period of time, in excess of 30  $\mu\text{g}/100\text{ g}$ . (The record did not show how many women workers there were or how many became pregnant over the same time period.) None of the children of the pregnant workers with elevated blood lead levels were shown to have any behavioral or learning problems. (There was one child of a woman worker who had behavioral problems, but the Johnson Controls' doctor was unable to link the problems to the mother's blood lead levels.)

The first legal question decided by the Court was whether the legality of a fetal protection policy is to be tested under a disparate impact/business necessity analysis or under a disparate treatment/BFOQ analysis. Under basic Title VII principles, the latter analysis applies where an employer policy or decision turns directly upon gender, while the former applies where the policy has a neutral basis, but in practice injures one sex more than the other. This question of which analysis to apply was critical because the business necessity defense was not only the more lenient standard but also required the plaintiff to bear the burden of persuasion on all questions, whereas the statutory BFOQ defense places the burden of persuasion on the employer. (The business necessity defense, but not the BFOQ provision, was amended by the Civil Rights Act of 1991 (21), so that the distinction between the two is now less stark than it was at the time *UAW versus Johnson Controls* was decided.)

All nine justices agreed that the fetal protection policy was intentional sex discrimination that could only be defended by proof that sex was a bona fide occupational qualification. Justice Blackmun's opinion made three important points:

a) The employer's "ostensibly benign" motive for its policy is irrelevant in determining whether a policy constitutes sex-based discrimination; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" (1, sect. 1203-4).

b) Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing (1, sect. 1203); "... th[e]... policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females."

(c) After the Pregnancy Discrimination Act of 1978 (PDA), "in which Congress explicitly provided that, for purposes of Title VII, discrimination 'on the basis of sex' includes discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions'" (1, sect. 1203), employers cannot argue that their fetal protection policies do not constitute disparate treatment because they treat all persons "capable of bearing children" the same. Congress has defined such policies as sex based.

It should also be noted that the Court was unanimous in concluding that Johnson Controls was not entitled to summary judgment even under a more lenient analysis, since Johnson Controls' policy did not "effectively and equally protec[t] the offspring of all employees" (1, sect. 1203) and because its claims of excess risks and potential costs were not documented. Of possible significance to future tort and OSHA cases, Justice White wrote that the Seventh Circuit "should not have discounted" the plaintiffs' evidence of male reproductive harm "as 'speculative'... merely because it was based on animal studies." According to White, the Supreme Court has "approved the use of animal studies to assess risks... and OSHA used animal studies in establishing its lead control regulations" [White's concurring opinion (1, sect. 1215)].

The major question dividing the parties in the Supreme Court in *UAW versus Johnson Controls* and separating the majority from the concurring justices when the case was decided was whether the BFOQ defense only excused sex discrimination if women were unable to perform essential job functions (as the plaintiffs argued), or whether it could be read more broadly to permit sex discrimination in order to accommodate the employer's concerns for fetuses (morality) and ruinous costs resulting from threatened tort liability (as the employer and the United States, as *amicus curiae*, maintained).

The five-justice majority in *UAW versus Johnson Controls* held that a fetal protection policy can exclude or burden women employees (or any group of women employees) only if those women are physically unable to perform the job. In *UAW versus Johnson Controls* there was no question that women, whether pregnant or not, are physically able to perform the production jobs in Johnson Controls' battery plants.

In reaching this result, the majority stressed the plain language of the statute and the narrowness of the BFOQ defense (previously emphasized by the Court), while not-

ing that "[t]he wording of the BFOQ defense contains several terms of restriction" (*viz.*, "'certain instances' where sex discrimination is 'reasonably necessary' to the 'normal operation' of the 'particular' business'") and that "the most telling term is 'occupational'; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes" (1, sect. 1204). "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job" (1, sect. 1205).

In so deciding, the majority opinion rejected the employer's argument that the fetal protection policy fell within the so-called safety exception to the BFOQ recognized by the Court in *Dothard versus Rawlinson* (22) and *Western Air Lines, Inc. versus Criswell* (23). In those cases, the court held that a) the "safety concerns were not independent of the individual's [physical] ability to perform the assigned tasks" (1, sect. 1205) and b) the third parties involved (passengers and prison inmates) "were indispensable to the particular business at issue" (1, sect. 1205). According to the majority, the expansion of the BFOQ defense to include cost and safety concerns—unrelated to job performance—would be inconsistent with the "essence of the business" test established in earlier opinions of the Court (1, sect. 1205-1206). For example, part of the "essence of the business" of air travel is insuring the safety of passengers. It could not be similarly concluded that insuring the safety of fetuses is part of the "essence" of the business of manufacturing batteries.

Further, the Court noted that a "fetal-protection" exception would contradict the plain language of the PDA, which provides that "women affected by pregnancy... or related medical conditions shall be treated the same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work" (1, sect. 1206). Similarly, the legislative history of the PDA made it clear that employers could not require a pregnant woman to stop working at any time during her pregnancy unless she was unable to do her work, even though there was evidence before Congress that employment late in pregnancy often poses risks (1, sect. 1207).

Justice White, writing for himself and two other justices, would have held that a BFOQ defense is available, based upon fetal protection concerns, if "reasonably necessary to avoid substantial tort liability" (1, sect. 1210). Even under his analysis, however, Johnson Controls' exclusionary policy, and, in all probability, almost any other such policy, would be invalid.

Under Justice White's approach, an employer could establish a BFOQ if he could show that the level of risk avoidance embraced by its fetal protection policy (in this case, zero risk because of the rule's coverage of all fertile women) is reasonably necessary to the "normal operation" of the particular business. In other words, Justice White also relies on plain language, but he would emphasize the words "normal operation" and not the words "occupational qualification" (1, sect. 1213-1215).

According to Justice White, Johnson Controls had not validated its policy under the "normal operation" language because a) "the fetal protection policy insists on a risk-

avoidance level substantially higher than other risk levels tolerated by Johnson Controls such as risks to employees and consumers" (1, sect. 1215), and b) the company previously operated without an exclusionary policy with no apparent difficulty or extraordinary costs (1, sect. 1215). White also criticized the breadth of Johnson Controls' fetal protection policy, as well as the court's failure to consider properly plaintiffs' evidence of harm to offspring caused by lead exposure in males (1, sect. 1215). Justice Scalia's concurring opinion was closer in reasoning to the majority's, except that he would not entirely foreclose a defense based on substantial cost (1, sect. 1216).

## Impact of *UAW versus Johnson Controls* on Reproductive and Developmental Health

The *UAW versus Johnson Controls* decision restored the issue of workplace reproductive and developmental health to the national agenda, but the focus of future activities will necessarily shift. In particular, the Court's opinion refocuses attention on the next step: the laws and procedures specifically intended to address workplace safety issues. Although the OSH Act does not prohibit a company from shutting down a hazardous occupation (and indeed may require it), it was never meant to authorize the exclusion or discharge of a significant segment of the workforce as a means of removing recognized workplace hazards. This much is clear from both the Act's plain language and its broad purposes. Section 5(a)(1) gives the employer only one method, short of a shutdown, for addressing recognized risks, *viz.*, "furnish[ing] to each of his employees employment and a place of employment . . . free from recognized hazards" [emphasis added (7)]. Plainly, excluding or discharging fertile women does not provide them "employment or a place of employment . . . free from recognized hazards" (7). Nor are such actions consistent with the stated purposes of the OSH Act. These purposes include "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions," "preserv[ing] our human resources," "encouraging employers . . . in their efforts to reduce the number of occupational safety and health hazards at their places of employment," and "stimulat[ing] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions" (7). All of these purposes contemplate the full and healthy participation of men and women in the workplace, not their exclusion.

Earlier efforts to enforce these provisions of OSHA—both to bar sex-based exclusions and to enforce workplace safety and health—had not been successful. In particular, women workers at the American Cyanamid Company plant in Willow Island, West Virginia, and their union, the Oil, Chemical, and Atomic Workers (OCAW), filed complaints with OSHA in 1979 asserting that the company's "fetal protection" policy, which had caused five women to submit to surgical sterilization to protect their job rights,

violated the Act.\* After an investigation, the Department of Labor issued a citation charging that American Cyanamid had violated Section 5(a)(1) of the Act (the so-called "general duty clause") by maintaining a policy that made sterilization a condition of employment and thus an employment "hazard."

The Occupational Safety and Health Review Commission (OSHRC) vacated the citation on the ground that the company's fetal protection policy did not create a "hazard of employment" (24). This decision was affirmed by the Court of Appeals for the D.C. Circuit (25) in an opinion by Judge Robert Bork that has been the subject of serious criticisms. A change of administration occurred between the time the initial OSHA complaint was filed and the time the case went to the appellate court. (The citation and suit were filed during the Carter administration, but the decisions of OSHRC and the court of appeals occurred during the Reagan administration.) Interestingly, the Labor Department refused to defend the original Section 5(a)(1) citation against American Cyanamid in the D.C. Court of Appeals. The Department of Labor has issued no additional citations against companies instituting or maintaining fetal protection policies.

Other courts might well have rejected Judge Bork's conclusions in *OCAW versus American Cyanamid*, but only the U.S. Department of Labor could have pressed such a case and obtained favorable decisions in other courts by continuing to cite employers for implementing fetal protection policies. The Department's decision not to continue to challenge the implementation and maintenance of fetal protection policies under OSHA was never explained. However, the decision was somewhat surprising in view of the Department's interpretation of Section 6(b)(5) of the OSH Act, which sets out the Secretary's responsibility for promulgating health standards and which, using the same kind of inclusive language as Section 5(a)(1), directs that the Secretary "in promulgating standards dealing with toxic materials . . . , shall set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life" (7).

The Secretary of Labor relied on this language in promulgating the 1978 Lead Standard, which rejected an industry proposal to exclude fertile women from jobs involving exposure to lead and which adopted instead a standard that, although not completely risk-free, reasonably assured reproductive and developmental health based on the information available at the time (26). Moreover, the Department's decision in the Lead Standard not to authorize a less protective standard based on the exclusion of

\*The women represented by the ACLU Women's Rights Project and the union also filed a lawsuit in Federal court challenging the company's policy as sex discrimination and asserting tort claims based on fraud, intentional infliction of emotional harm, and violation of the right to privacy. That case was settled.

fertile women was specifically upheld by the D.C. Court of Appeals (27).

The critical point is this: whatever the Department of Labor's reason for not challenging fetal protection policies under the OSH Act, the underlying premise of *OCAW versus American Cyanamid*, that fertile women could be excluded in order to achieve safety objectives, is no longer viable after *UAW versus Johnson Controls*. Given this ruling, one might have expected the business community to radically reform its approach to reproductive and developmental health hazards in the workplace. While this may yet happen, the initial reported response of the business community has not been encouraging. This suggests that a major enforcement initiative will be needed if women and men are to enjoy adequate workplace protection for reproductive and developmental health and if women are to now have equal access to industrial jobs.

### **After *UAW versus Johnson Controls*: New Legal Strategies for the Future**

Four primary concerns have been raised in the wake of *UAW versus Johnson Controls*. First, there are apparently some employers who believe that Title VII, as interpreted by *UAW versus Johnson Controls*, forbids employers from absolutely excluding fertile women from developmental-risk jobs, but not from discouraging women (and not men) from taking such jobs. Second, some businesses that had fetal protection policies do not seem to have implemented any work practices or engineering controls that would mitigate or remove the hazard recognized by the policy, but rather have simply sought waivers from any fertile women who insist on taking jobs previously covered by an exclusionary policy. Third, there is growing evidence of a reverse *Johnson Controls* policy, where employers are *a)* refusing accommodations that they had previously extended to women who became pregnant while working with toxic substances, including temporary transfers, disability leaves (either with or without reduced pay and/or benefits), or leaves without pay or *b)* contesting claims for unemployment insurance where pregnant women have quit such jobs because of the unavailability of any accommodations, all on the grounds that pregnant women cannot be prohibited from performing such work. Fourth, the entire fetal protection policy debate emphasizes the need for a remedy that will both compensate employees for the loss of their reproductive and sexual function (which currently does not exist) and will induce the employer to remove the workplace hazards that result in such losses. Moreover, as the California decision in *Bell versus Macy's, Inc.* (28) makes clear, there is the additional need for damages where the workplace exposure or other negligent action by the employer causes palpable injury that is not now compensable.

What litigators need now is a comprehensive set of strategies for addressing these responses and for securing both job access and the implementation of responsible programs for assuring the reproductive and developmental health of both men and women employees. These strategies can be examined under four specific employ-

ment objectives: *a)* job access, *b)* securing reproductive and developmental health protection in the workplace, *c)* making accommodations for women and men who choose not to continue working in jobs that pose a threat to reproduction; and *d)* compensating employees (and their children) for any injury to reproductive and developmental health and deterring workplace practices that result in such injuries. These strategies include making better use of existing laws and, in some cases, seeking legislative change.

### **Assuring Job Access to Women Employees**

After the decision in *UAW versus Johnson Controls*, some employers have claimed that, while the Court's decision made it unlawful to exclude or terminate fertile women from employment, it did not make it unlawful for employers to discourage fertile women from taking jobs involving exposure to toxic substances. One company suggested a multistep program, with recommended interventions at the time of application, during the pre-employment physical, and later, at the bidding and job transfer stage. At the time of application, each applicant would receive an application form that would contain the following notation: "The use of lead in our manufacturing operations creates a lead absorption risk for employees. That risk varies throughout the plant. . . . Scientific and medical evidence indicates that a woman capable of bearing children can cause damage to the brain of her unborn child if she works around lead with lead levels higher than those in her home. The Company strongly recommends that women of child-bearing capacity not seek jobs . . ."

If, despite this warning, a fertile woman submits a job application and is otherwise selected for employment, she would then be given "additional counseling," either prior to or as part of the pre-employment medical examination, "to assure that [she] underst[ood] the risks involved with lead exposure . . . and the possible resulting body burden of lead upon a child which [might] be conceived." The company's physician would recommend against such employment and, if the woman still insisted on the job, she would be required to sign a statement, "acknowledging" her "acceptance of responsibility for the risks involved as a *condition of employment*" (emphasis added).

Similarly, if a fertile woman seeks to transfer to a job involving toxic exposures, she would be required to undergo the same counseling and would be required to sign the same statement accepting responsibility for her decision as a condition of continued employment. In addition, she and all other fertile women who had such jobs would be required to attend yearly counseling.

Obviously, there is nothing "neutral" about this proposed program. It singles out fertile women, but not fertile men, for specialized notice and counseling that is explicitly designed to discourage them from accepting the very jobs that the Supreme Court ruled could not be closed to them under the company's fetal protection policy. The notion that this modified fetal protection policy does not also violate Title VII of the Civil Rights Act is flatly contradicted by the Supreme Court's decision in *UAW versus Johnson Controls*. Title VII does not only make it unlawful

"to fail or refuse to hire or to discharge any individual . . . because of . . . sex," it also, by its very terms, makes it unlawful "otherwise to discriminate against any individual . . . because of . . . sex" (6). As noted by the Supreme Court, this language was "intended to strike at the *entire spectrum* of disparate treatment of men and women" (29). Congress wanted "to guarantee women the basic right to participate fully and equally in the workforce" (30).

In this connection, the courts have not hesitated to find a violation of Title VII of the Civil Rights Act where employers have imposed additional burdens on women and minorities during the application process. For example, *King versus Trans World Airlines, Inc.* (31) held that the employer could not have two interview policies for job applicants: one for women, where it asked questions about pregnancy, childbearing, legitimacy of children, and child care, and another for men, where it asked no comparable questions. Also, *EEOC versus Metal Service Co.* (32) found a violation of Title VII where black applicants were required to undergo a burdensome application process through the state job service, while white applicants were being hired through word-of-mouth recruitment.

There is no question that the modified fetal protection policy described above would burden employment opportunities for women; indeed, it was designed to have just that effect. First, women (but not men) are required to answer questions about extremely private matters (their infertility and childbearing plans) and to undergo counseling about those matters. Many women would find this invasion of privacy sufficiently offensive to induce them to drop their efforts to apply for employment. Similarly, the requirement for yearly counseling of women who have elected lead jobs against the advice of the company's physician is potentially harassing and interferes with decisions that are more appropriately made by the women themselves. Women, but not men, are singled out for constant pressure from the employer to find other employment or to transfer to other jobs.

Moreover, the company's requirement that women sign a formal document, purporting to shift to them "responsibility" for any harm that might occur, is extremely intimidating. Again, its primary purpose is to discourage employment. If the employer merely wanted proof that employees had been fully and adequately warned about occupational hazards, a simple form signed by the employees acknowledging that they had been given such instruction would be sufficient. The intimidating nature of the form is obviously designed, not to document the employer's provision of educational materials and warning of hazardous employment, but to further discourage women from pursuing employment. Also, the warning is biased and misleading because it contains an extreme statement of the fetal risk—implying permanent "damage to the brain" in every child born to a woman whose blood lead levels exceed what is normally found in the home—while wholly omitting any mention of the reproductive risks faced by male workers, a risk OSHA has found to be significant (26). Finally, it is only necessary to provide different warnings to women if the employer fails to maintain a work environment that is equally safe for

women and men. Title VII requires employers to offer women equal access to jobs and equal terms and conditions of employment, arguably including equally safe working conditions, unless it is impossible or infeasible to do so. This does not mean that the employer may not warn workers of the risks of employment that cannot feasibly be reduced or eliminated. Indeed, employers must provide such health information to workers, but they must do so in a way that does not constitute discrimination. At a minimum, this means that any information must fully, fairly, and accurately describe the risks to both males and females and that the information must not be presented with the purpose or effect of discouraging or harassing women.

The "informed consent" concept used in the medical context provides a useful model and a well-developed standard for judging the sufficiency of warnings. This model requires medical care providers to provide information about alternatives to a particular course of treatment, for example. In the employment context, this would suggest, among other things, that individuals working in the lead industry, to be deemed to have knowingly acquiesced to irreducible risks that are inherent in the manufacturing process, must be informed that they have a right to request medical removal in certain circumstances (e.g., to safeguard reproductive function, if blood lead levels exceed 30 µg/dL, or if recommended by a physician).

Disability law also suggests principles that should apply in situations in which workers face irreducible risks to reproductive well being. Employers are required to make reasonable accommodations to permit an otherwise qualified, but disabled, individual to work (33). This obligation is limited only if an employer shows that accommodating the worker would be an "undue hardship." The same standard should apply where necessary to accommodate pregnant workers or males facing an unacceptable level of reproductive risk. If an accommodation is available without undue hardship to the employer and a similar benefit has been provided to disabled employees, the refusal to extend this benefit to individuals threatened with reproductive injury, if an injury results, ought to be construed as a grossly negligent, willful, or intentionally tortious act.

In summary, these companies suggest that their obligations to women under Title VII of the Civil Rights Act are satisfied if they simply allow women to apply for work or job transfers, even though they then discourage them from taking the jobs. This is not unlike a company arguing that it has satisfied its obligation to minorities by offering them employment, while at the same time cautioning that they will find their co-workers biased and that they can therefore expect unpleasant working conditions. It is the employer's duty to make sure that such behavior does not occur (34). Any other result would frustrate the purposes of Title VII. Similarly, in the case of occupational health hazards, it is the employer's responsibility to take the kind of action necessary to remove the hazard from the workplace. It is not enough to simply caution women and to hope that, as a result of the caution, fertile women will not seek employment. That approach violates Title VII of the Civil Rights Act. It also violates the employer's responsibilities under the OSH Act.



## Eliminating Reproductive and Developmental Health Risks in the Workplace

The entry of large numbers of fertile women into the workplace and the increasing evidence of reproductive risks faced by both the male and female workers should cause the government and employers to focus more directly on reproductive and developmental health risks and to move much more aggressively in protecting against such risks.

**Voluntary Action.** The most effective strategy for reducing reproductive and developmental health risks in the workplace would be a voluntary effort by employers. Entry of fertile women into jobs once closed to them because of fetal protection policies ought to induce employers to give their immediate attention to the reproductive and developmental health risks that admittedly exist in such work environments. Previously, they had little incentive to remove or mitigate these risks because male employees generally could not recover for any injuries to their reproductive or sexual function (unless those injuries also resulted in a work disability). At most, employers paid any medical cost for treating such conditions.

Nonetheless, in the months following *UAW versus Johnson Controls*, there has been no evidence of any major employer initiative in this area. Of course, there have always been some employers who have routinely and historically addressed reproductive and developmental health risks. The Dow Chemical Company would appear to be in this category. One of its medical experts, K. S. Rao, wrote in 1981 that it was the policy of the Dow Chemical Company to protect all employees, male and female, from any overexposure to any chemical; that its policy was to set an exposure level that protects "the population most sensitive to the toxic effects of a certain chemical"; and that it "maintain[ed] chemical exposure levels sufficiently low to allow for the acceptable employment of women of child-bearing potential without harm" (35). Following *UAW versus Johnson Controls*, this health policy should become standard throughout industry, since the OSH Act requires that employers remove any "recognized hazard" of employment, and Title VII prohibits the exclusion of fertile or pregnant women, even in situations where they might be the most sensitive population. Thus, while the Supreme Court did not decide any of the underlying health issues in *UAW versus Johnson Controls*, it did assume a degree of employer responsibility. As the Court noted (1, sect. 1209): "Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace." The Court's assumption seems clear: employers should remove the hazard, not the women. But what about those companies that ignore this new mandate? Is there anything that can be done legally to compel the necessary workplace modifications?

**The Need for OSHA Enforcement Action.** As noted earlier, Section 5(a)(1) of the Occupational Safety and Health Act imposes a general duty on each employer to furnish a "place of employment" that is "free from recognized hazards that are likely to cause . . . serious physical harm to his employees." Under the case law, the Secretary of Labor, in order to make out a Section 5(a)(1) charge, has to show *a)* serious physical harm to the employee, *b)* from a recognized risk, *c)* that was preventable. The term "serious physical harm" includes any impairment of the employee's reproductive or sexual function. The *Guides to the Evaluation of Permanent Impairment* (36), issued by the American Medical Association, includes as a medical impairment the loss of the employee's reproductive and sexual function, including the loss of a man's ability to father children. Similarly, if a woman is infertile, suffers a miscarriage or a stillbirth, or gives birth to a child with birth defects because of workplace exposures, she herself has suffered a "serious physical harm" because of the impairment of her reproductive capacity. The fact that the child may also have suffered "serious physical harm" in no way negates the harm to the mother's reproductive function.

With respect to the second requirement, it seems clear that any company that previously had a fetal protection policy or that now warns its employees of reproductive and developmental risks and/or asks its employees to sign a waiver acknowledging that they have been warned about the risk and "accept responsibility" for such risk, has "recognized" a "hazard of employment" as those terms are used in Section 5(a)(1) of the Act.

Once the employer has (or should have) recognized the hazard, the employer cannot, as the waiver would attempt to do, shift the burden of the hazard back onto the employee by giving the employee the option of either continuing to work under the hazardous condition or quitting and looking for work elsewhere. The whole purpose of the Act is to require that an employer whose workplace has a recognized hazard affirmatively investigate measures for preventing that hazard. While the OSH Act does not impose a duty of absolute safety, it does require the elimination of any significant and preventable hazards. And while the courts have found that Congress did not intend to protect employees by putting their employers out of business "either by requiring protection . . . unavailable under existing technology or by making financial viability generally impossible" (37), it is no defense to a general duty clause violation that the abatement or mitigation of the hazard would be difficult or expensive (38).

There are several immediate enforcement actions that the Department of Labor should take in the aftermath of *UAW versus Johnson Controls*. First, OSHA should send out a general communication to all employers advising them that, if they had a fetal protection policy prior to *UAW versus Johnson Controls*, or if they are currently requiring any of their employees to sign a waiver acknowledging a risk and accepting responsibility for that risk, and have not taken any affirmative steps to remove or mitigate the asserted risk, they would appear to be violating Section 5(a)(1). The kinds of affirmative steps that



employers should consider would include engineering controls, toxic use reduction, and various personnel practices. These practices could include gender-neutral health education, as well as voluntary removal and transfer programs, provided that the latter measures were temporary (until risk reduction could be completed) and included rate and benefit protection.

Second, OSHA should at least issue a public statement clarifying that the waivers being solicited by employers are void and unenforceable as contrary to public policy and do not satisfy the employer's obligations under Section 5(a)(1) to take affirmative steps to remove the recognized hazard or, where that is not technologically or economically feasible, to institute other methods for mitigating the hazard. Third, the Department of Labor should schedule special inspections of industries that routinely used fetal protection policies and/or of the companies that were known to have used such policies to determine whether their conduct after *UAW versus Johnson Controls* complies with the requirements of the Act.

The Department's failure to take any of these actions has resulted in all too much business as usual. For example, the Exide Corporation (which had a fetal protection policy) issued written instructions to its personnel on how to deal with claims for workplace protection following *UAW versus Johnson Controls*. According to this advice, employers are "not required to provide medical removal protection (MRP) in cases where an employee . . . is removed at his or her request because of a concern about the effects of lead exposure on his or her reproductive health or the health of a fetus. Since pregnant women cannot be excluded from lead-exposed positions by Company Physician, the woman would not be eligible for MRP" (39).

This advice contains at least two significant errors. *a*) It misstates the employer's obligation under the Lead Standard. Section 1910.1025(k)(1)(ii) of the Lead Standard (26) explicitly requires that employers initiate MRP for any employee where a "final medical determination results in a medical . . . opinion that the employee has a detected medical condition [e.g., pregnancy] which places the employee at increased risk of material impairment to health from exposure to lead." While employees have a right to demand a multiple physician review, either in seeking such a determination or in challenging such a determination, a company whose physician has strongly recommended that fertile women not work in jobs resulting in blood lead levels in excess of 10  $\mu\text{g}/100\text{ g}$  cannot now determine that a pregnant woman is at no increased risk of material impairment. Moreover, Appendix A to the Lead Standard specifically recommends that MRP be triggered for men and women who wish to bear children whenever their blood leads reach a level of 30  $\mu\text{g}/100\text{ g}$  (26).

*b*) Without regard to any standard, Section 5(a)(1) of the OSH Act (7) requires employers to remove recognized hazards insofar as feasible. Having "recognized" a significant risk to fertile and pregnant women at blood levels above 10  $\mu\text{g}/100\text{ g}$ , the employer has a duty to initiate all feasible methods for reducing or eliminating this recognized hazard. Since MRP is certainly feasible in this

industry (particularly given the low birth rate for industrial workers), the employer could be required to implement mechanisms like MRP even in the absence of a standard and at levels of exposure below those recommended in the standard.

There is other documentary evidence that companies are violating the Lead Standard in their response to the *UAW versus Johnson Controls* decision. For example, Exide has prepared "educational" materials to "assist individuals in making an informed judgment regarding their decision to work in a lead environment." These materials represent "that it is unlikely adult males and females with blood-lead levels below [50  $\mu\text{g}/100\text{ g}$ ] will experience any significant adverse effects on their reproductive health" (39). This statement misrepresents OSHA's findings, reported in Appendix A of the Lead Standard, that there are reproductive risks to both males and females at blood leads of 30  $\mu\text{g}/100\text{ g}$ . It also misrepresents the Environmental Protection Agency's (EPA) conclusions about the cardiovascular risks to adult men from a 10  $\mu\text{g}/100\text{ g}$  level exposure, which formed the basis for EPA's decision to ban lead in gasoline. Indeed, men with a personal or family history of cardiovascular disease should be specifically warned about this significant risk.

Another company's educational materials state, with respect to the risk of lead exposure on adult health, that "the use of lead in our manufacturing operation creates a lead absorption risk for employees" (40). There is no further explanation of what this risk is. Such a statement seriously understates the risks associated with lead exposure and does not comply with the Lead Standard's requirement that employers "inform employees of the content of appendices A and B of this regulation" (26).

The materials go on to state that "a woman . . . can cause damage to the brain of her unborn child if she works around lead with lead levels higher than those in her home. The company strongly recommends that women of child-bearing capability not seek jobs where they will have to work with lead materials. Blood lead levels as low as 10  $\mu\text{g}/100\text{ mL}$  have been shown to cause decreased intelligence resulting in retarded learning, slower coordination, and serious behavioral problems. Any brain damage to the baby probably will be permanent" (40). In light of its warnings to men, this statement seems intentionally designed to mislead men and shift the burden to insure fetal safety to women by inducing them to forego work, again relieving the employer of the obligation to clean up.

Moreover, the employer violates the explicit requirement of the Lead Standard that any training program "include information concerning the adverse health effects associated with excessive exposure to lead (with particular attention to the adverse reproductive effects on both males and females)" (26). The need for nondiscriminatory training was further emphasized in the preamble to the rule (20). As stated there:

. . . During the hearings, there was considerable testimony on the need to inform workers, both male and female, of the severe effects on the reproductive system from exposure to lead . . . For example, Andrea Hricko stated: "Employees and job applicants must be informed that excessive exposures to

lead have resulted in reproductive difficulties, including fertility problems, menstrual disorders, stillbirths, miscarriages and other hazardous effects so that they understand the significance of blood, sperm, and pregnancy testing" . . . OSHA is in complete agreement with this view and therefore will require the employer to develop an education program which addresses the danger of exposure to lead on the reproductive system, and on employee options as part of the medical surveillance program, e.g., fertility and pregnancy testing. OSHA believes this is a crucial provision of the standard. A worker, whether male or female, who is fully informed of the hazards of lead will be better able to avoid the adverse reproductive effects documented in the preamble. The knowledge of the hazard in this instance is crucial since there is concern that workers whose blood leads do not exceed the 30  $\mu\text{g}/100\text{ g}$  level may still be at risk especially if they have extended tenure in a lead industry.

Finally, a nondiscriminatory policy should contain information on all significant and equivalent health risks, and not just reproductive risks. While employers may communicate the opinions of their own medical advisers, they must be clearly labeled as such. They cannot communicate only that information, and not the other scientific information, including different opinions and especially conclusions reached by Federal regulators in establishing appropriate levels of protection against other significant and equivalent adult risks.

What can labor and civil rights groups do if OSHA fails to take any of the simple steps outlined above? The options are limited but not nonexistent. As mentioned earlier, the OSH Act does not give employees the authority to bring their own law suit against an employer who has failed to comply with Section 5(a)(1) of the Act or with any specific standard promulgated by the Secretary of Labor. However, it might be possible to bring a law suit against the Secretary of Labor to obtain a court order directing the Department to enforce the law, especially against employers who violate specific provisions of standards, such as by failing to inform men that lead is a male reproductive toxicant, or by failing to provide MRP benefits to pregnant women with excessive blood lead levels. Unfortunately, an agency's refusal to take any specific enforcement action is generally considered an exercise of prosecutorial discretion and one that the courts will not review (41). There are some limited exceptions to this rule if the agency's refusal to initiate enforcement action is based on a misunderstanding of the law or if its actions amount to an abdication of its statutory responsibilities (42,43).

This raises the additional question of whether legislation to improve workplace safety, such as the Comprehensive Occupational Safety and Health Reform Act of 1991, introduced by Senators Kennedy and Metzenbaum as S.1622, should be amended to provide for private enforcement of the law. While giving a Federal agency the exclusive right to sue helps control the case load, there are other ways to eliminate frivolous suits. Restricting who can enforce the law makes employees' safety and health rights subject to the capacities and proclivities of an understaffed and (sometimes) politicized government agency. Apart from this concern, there is every reason to allow both employees and the agency to bring law suits to enforce the

protections of the OSH Act.\* It seems anomalous to allow private suits to protect the rights of employees to wages, pensions, benefits, and nondiscrimination, but not the rights of employees to a safe and healthy workplace. To the extent that employee suits might raise complex questions of abatement or preventability, the three commissioners appointed to the OSHRC who hear these cases are selected for their expertise in the area (7). Moreover, the Department of Labor can always intervene as a party in appropriate cases or file an amicus brief presenting its views.

A final strategy for forcing OSHA to respond more aggressively to enforce reproductive and developmental health in the workplace would be to ask the appropriate Senate or House Subcommittees to conduct hearings. These hearings could prove valuable in determining just how many companies had fetal protection policies and what kinds of action have been taken since the *UAW versus Johnson Controls* decision to remove or mitigate the hazards to reproductive and developmental health.

**Effect of Waivers.** It has been a fairly common practice after *UAW versus Johnson Controls* for companies to require that women previously covered by a fetal protection policy sign a so-called waiver, similar to the following:

The law requires that you be given the option of choosing whether or not to accept a job for which you are otherwise qualified, even if it may involve significant lead exposure and risk to your future children. The Company strongly and emphatically recommends that you not accept placement in a job where the blood lead level may exceed 10  $\mu\text{g}/100\text{ mL}$ . I understand and accept responsibility for these risks which have been explained to me by the nurse and examining physician for this plant. I have been encouraged to discuss these risks with my family and personal physician before accepting any such position (40).

These waivers are different from a simple acknowledgment that the employee has attended a training or educational meeting on reproductive and developmental health risks. In addition to discouraging women from taking such jobs, they attempt to relieve the employers of their obligations under both the OSH Act and tort law.

Such waiver language is void and unenforceable as contrary to public policy (44-47). As a result, it does not exempt the employer from any tort liability for any injury or harm caused by its negligence, nor does it constitute a defense to a Section 5(a)(1) OSH Act violation.

The real harm in the waivers is that employees, having signed them, often believe that the employer does not have any further responsibility under the law. As a result, they do not report unhealthy working conditions to their union representatives or to the proper authorities, and they may fail to assert other legal rights. Certainly, in any case where an employee is fired for refusing to sign a waiver,

\*Safety and health disputes are not like disputes arising under the National Labor Relations Act and the Landrum Griffin Act, where employee suits are also banned. In those cases, there are important policy considerations that support the curtailment of private litigation so as not to delay collective bargaining or discourage the resolution of disputes through grievance mechanisms. OSHA enforcement presents no such concerns.

the discharge should be challenged in state court under the wrongful discharge doctrine (48). Moreover, it may also be possible to obtain a declaratory judgment from a state court declaring that these waivers are void and unenforceable because they are contrary to public policy.

**Standard Setting.** The Department of Labor, in addition to its enforcement role, has the responsibility for promulgating safety and health standards to protect employees in the work force. Under Section 6(b)(5) of the OSH Act, the Secretary of Labor, in setting standards dealing with toxic substances, "shall set the standard which most adequately assures . . . that no employee will suffer a material impairment of health or functional capacity" (26). Both the Secretary of Labor and the Court of Appeals for the D.C. Circuit have interpreted this language as requiring the Secretary to include in its significant risk analysis all workers, including those who are the most susceptible. For example, *Building and Construction Trades Department versus Secretary of Labor* (49) held that OSHA, in performing its asbestos risk assessment, correctly included smokers and correctly assumed a 45-year work life (even though most workers in the industry are there for less than 5 years). Also, in *Auto Workers versus OSHA* (50), the Court held that OSHA, in assessing the risk of dermal effects of exposure to formaldehyde, properly considered the effects of formaldehyde on "sensitized workers" who make up 20-30% of the population.

It is true that, in performing the second step of its standard analysis (*viz.*, setting the lowest feasible level when the safe level is not feasible), OSHA has previously mandated special treatment for workers with higher risk propensities (such as persons who are unable to wear respirators). However, OSHA concedes that such distinctions cannot be based on sex, fertility, or pregnancy any more than they can be based on race (Secretary Scannell, October 6, 1991, personal communication). That view is consistent with the normal rules of statutory construction requiring that a Federal statute should not be interpreted in any way that would be inconsistent with the mandates of another Federal statute (in this case, Title VII and the Pregnancy Discrimination Act of 1978) unless no other interpretation were possible.

In promulgating standards under Section 6(b)(5), OSHA has regularly set standards at a level designed to protect both reproductive and developmental health (e.g., the Lead Standard). However, the standard-setting process has been slow, and there are a number of substances and processes that present reproductive and developmental health risks that have not been the subject of any regulatory action. Where a standard is in effect, Section 5(a)(2) of the Act requires employers to comply with that standard. But where there is no standard, the employer's only obligation is to eliminate recognized risks.

There are two problems with the standard-setting process. One is the time required to promulgate a final standard. The other is the inability of OSHA to regularly update existing standards with the addition of new information. As a result, some of the existing standards are inadequate when measured against more current medical and scientific findings.

**MORE STANDARDS NEED TO BE ISSUED.** According to the 1991 report prepared by the General Accounting Office (GAO), OSHA has not regulated 9 of the 30 chemicals that GAO has identified as having significant adverse reproductive and developmental effects (51). Obviously adequate protection of reproductive and developmental health requires additional regulatory action.

**WHEN STANDARDS ARE OUT OF DATE OR KNOWN TO BE INADEQUATE.** Although standards generally provide employers with greater notice of their duties under the OSH Act than the generally worded requirement of Section 5(a)(1), the Court of Appeals for the D.C. Circuit has recognized that there could be circumstances where an employer, even though in compliance with an applicable standard, would still be in violation of Section 5(a)(1) if it knew that the conditions at its place of employment were such that the standard would not adequately deal with the hazards to which its employees were exposed (52). The Court's holding is based on the premise that the Department has no authority to trump Congress's explicit mandate under Section 5(a)(1). Under that premise, it would follow that, even if the standard dealt with the specific health issue (i.e., a safe level of exposure), the employer could not rely on the standard for a safe harbor if the employer knew that the level of exposure specified in the standard was no longer adequate to protect against recognized risks and if the unacceptable level of risk exposure was preventable.

### Accommodating Workers at Risk

Because it will not always be possible to provide a work environment that does not present significant risks to reproductive and developmental health, an important part of any comprehensive health and safety program is the provision of temporary job transfers and/or disability leaves when the employee cannot safely work in his or her usual job for a period of time. The need for such a program can often arise when a woman becomes pregnant, when a man experiences sexual dysfunction or has sperm abnormalities, or when other symptoms reveal that an occupational hazard to reproduction requires temporary job modification. The Lead Standard, with its provision for the temporary removal of both men and women from lead-exposed jobs where their doctors have recommended such action, is an important example of how these health concerns should be met.

Unfortunately, OSHA has not always vigorously enforced these medical removal protections. Unions and employees should report violations of the Lead Standard's MRP provisions to OSHA and request enforcement. The union might also initiate a grievance or a Title VII charge. For example, in *UAW versus Johnson Controls*, one of the individual plaintiffs was a male employee who complained that the company had denied his request for a 3-month leave of absence, which he had requested "for the purpose of lowering his blood lead level to enable him to father a child," under circumstances which constituted a violation of Title VII because a similar request would have been granted to a fertile female (53). But what kind of relief can

male and female employees expect in the absence of an OSHA standard?

There are currently five states (California, Hawaii, New Jersey, New York, Rhode Island; Puerto Rico also has a temporary disability insurance program) that provide short-term partial wage replacement protection for workers who are unable (because of a disability or physical or medical condition) to perform their regular or customary work. Most of these statutes provide benefits for a period of 26 weeks. It is important to establish, in each of these states, that the conditions described above qualify for disability income protection. (Income replacement is only required where the employer cannot find work that the employee is able to perform for the period of his or her disability.)

Since *UAW versus Johnson Controls*, there have been reports that some employers have refused disability to pregnant women on the grounds that the health threat is to the unborn child and not to the physical health of the mother. This response, while predictable, is not consistent with legal principles. Reproduction is one of an individual's most basic body functions. Any condition that interferes with the individual's ability to reproduce or impairs the health of the fetus and future child (e.g., infertility or a tendency toward miscarriages, stillbirths, or birth defects) is a "physical condition" for purposes of the state disability laws if it prevents the employee from safely working in his or her usual job. If the employer cannot find a temporary transfer, the condition becomes a "disability." One case directly in point is *Pond versus Oliver* (54). In that case, a woman employee was told by her doctor that she should not remain in any work environment containing paint fumes while she was pregnant because of a potential hazard to the fetus. She quit when the employer was unable to provide her with a place of employment free of paint fumes. The court held that her separation from employment "was clearly not voluntary but occasioned by illness," that she was thus "disabled" in connection with her pregnancy, and that she was entitled to disability benefits.

In a more recent California case, the administrative law judge ruled that a pregnant woman qualified for state disability insurance benefits when her physician recommended almost complete bed rest (making it impossible for her to go to work) in an effort to encourage fetal growth. In concluding that the woman's condition was "disabling," the judge noted that "maternal health cannot be separated from the health of the fetus," and that it "would be unreasonable to expect the claimant to make a choice between the health of her baby and loss of her disability benefits" (55).

It seems clear from the typical language used in the state disability statutes, in short-term disability benefit plans provided by private employers, and in the unemployment insurance laws, that medical conditions relating to an employee's ability to conceive and give birth to a healthy child are medical conditions eligible for "disability" or unemployment insurance benefits in those situations where the employer cannot or will not offer suitable alternative employment for the duration of the disability.

Admittedly, each of the 50 state unemployment statutes treat employees who "voluntarily leave work" somewhat differently. All states recognize that a person who quits for good cause is involuntarily unemployed. Some states require that a good cause "be connected to the work" or "attributable to the employer." Others include as "good cause" purely personal reasons such as relocation of a spouse to another jurisdiction. Whatever the state, a woman who quits because the work is hazardous to her health or to that of her fetus has left work for "good cause" connected to the work or "attributable to the employer." As a result, she would qualify for unemployment compensation, at least so long as she remains able and available to do other work (56).

The employer's refusal or inability to find such work may or may not violate either Title VII of the Civil Rights Act or the employer's "general duty clause" obligation under the OSH Act. A Title VII violation would occur if accommodations were made for other kinds of disabilities and if the refusal to accommodate for disabilities relating to reproduction were directed only at pregnant women or disproportionately affected women.

Whatever laws the employer may have violated in refusing to accommodate the employee's medical condition relating to reproductive and developmental health, the existence of the medical condition triggers the protections of the various disability and unemployment insurance laws. Accordingly, it is important for employees to understand what rights they have to job retention and partial income replacement, and how to enforce those rights by filing claims under the benefit plan or under the state disability law (in the five states that have them) and/or under state unemployment insurance law. If the administrator of the private disability plan improperly denies the claim on the ground that a physician's concern for the fetus and/or for a healthy pregnancy outcome is not a physical or medical condition, Section 502(a)(1) of the Employee Retirement Income Security Act allows the employee to file suit "to recover benefits due . . . under the terms of an employee benefit plan" (57). The trial court, in reviewing the denial of the claim, will typically interpret the language of the plan under general principles of contract law, which means that any ambiguity in the language of the plan will be construed in favor of the plan beneficiary, or, in this case, the worker.

For those employees who work in a state without a disability law and for an employer who does not provide private plan disability benefits, there are fewer choices when the employer refuses to make the necessary accommodation in work assignment or is unable to do so. However, if the employee decides to quit and apply for unemployment insurance benefits while seeking other employment that does not present the same medical risks, he or she would be eligible for such benefits, since the quit would not be deemed to have been voluntary because it was necessitated by the employee's medical needs.

Finally, even if the employer does not make available other work that the employee can do, the employee or the employee's union may be able to work out an arrangement for leave without pay. This option might be more desirable

than unemployment insurance if immediate income is not the problem and if the employer is willing to retain the employee's job. This model has been adopted by the three states that have enacted a family and medical leave law that includes some protection for the employee who needs leave because of his or her own "serious illness" or serious medical condition" (58). Under these laws, the employee is allowed from 2 to 16 weeks of unpaid leave during which time the employee receives job retention rights and continued medical benefits. Because so many states, as well as Congress, are currently considering the adoption of similar statutes, it would seem that the issue of reproductive and developmental health should be more carefully considered in drafting these laws. Obviously, one problem with the current statutes is the very short period of protection (which in Wisconsin is only 2 weeks). Second, it is not entirely clear that the term "serious health condition" or "serious illness" includes physical conditions related to reproductive and developmental health. The Wisconsin statute defines a "serious health condition" as a "disabling illness, injury or condition involving: (a) inpatient care in a hospital, nursing home, or hospice, or (b) outpatient care that requires continuing treatment or supervision by a health care provider" (58). It may be that some different language should be used to cover the problem of leaves in aid of reproductive and developmental health.

Even without such laws, there is nothing to prevent unions and employees (where there is no union) from attempting to obtain the employer's agreement to permit employees to take a voluntary leave without pay to promote the employee's reproductive and developmental health. Of course, any state law or collectively bargained agreement that provides only partial wage replacement for employees temporarily disabled because of pregnancy or other reproductive conditions, or worse, unpaid leave, while of some help, is hardly the optimal solution for accommodating the employee's reproductive health needs.

### Compensating Employees and Their Children for Injury

The entitlement to monetary recovery when employer negligence results in reproductive injury seems self-evident. Moreover, the need for such a remedy in such cases is often urgent because many injuries are not currently compensable and the workers most likely to confront reproductive risk at work may lack financial resources to cope with such injuries, especially if the injury results in infertility or the birth of a child with special medical needs.

The limitations of the workers' compensation system with regard to reproductive risk have already been mentioned. Briefly, work-related injuries to adult reproductive health or function are generally compensable only through workers' compensation and are thus subject to the limited remedies available in that system. Generally, such injuries are not compensable at all, because they are not covered under workers' compensation [for example, if they are not work disabling (59)]. Resort to the civil tort law remedies is nonetheless precluded by the workers' compensation

"exclusive remedy" doctrine. In such situations, injured workers may have no remedy to compensate for injuries even when employer negligence is present.

In some states, workers who have been injured as a result of gross negligence or intentionally wrongful acts may be able to bypass workers' compensation and seek a remedy in tort law, but such cases are unusual and may be difficult to win because of the need to prove the intentional or egregious nature of the employer's conduct (60,61). Better remedies are thus plainly needed to compensate adult workers, especially for reproductive injuries that are not work-disabling but that can be traced directly to the occupational setting.

As a general rule, it has been assumed that the children of workers are not bound by the workers' compensation system for any injuries that they may suffer due to employer negligence to the parent (62,63). As a result, it has been assumed that such a child could sue the parent's employer under any applicable tort law theory (negligence, intentional tort, strict liability). Such cases have been brought, more often by the children who assert paternal occupational exposure to mutagens prior to conception (17); there is at least one reported case alleging injury from prenatal exposure to lead (64).

These cases have met with limited success, largely because of the difficulty of proving cause and effect and employer negligence and because of the successful interposition of various technical defenses. Some plaintiffs have undoubtedly received monetary settlements, but these are rarely reported on any official legal form and are often difficult to trace or confirm. The reported decisions reveal that, even where tort remedies are available, the limitations of the tort law system—requiring that plaintiffs commence suit within a limited time period (sometimes foreclosing suit for injuries that are not immediately or easily apparent) and that they prove causation and negligence—render them of limited utility in redressing injuries. It is thus unclear to what extent the tort law system deters employer negligence regarding occupational reproductive risks. Plainly, the threat of tort liability has some deterrent effect on employers but that effect could be vastly enhanced if legal requirements were better tailored to accommodate this type of injury.

Whatever corrective value access to the tort law provides has been eliminated in California by a recent court decision essentially exempting employers in that state from liability for negligence to a pregnant woman resulting in harm to the fetus and later-born child. This case, and others that reached a different conclusion, illustrate the thorny dilemma facing courts and legislatures in trying to create a meaningful remedy for reproductive injury that results in harm to a fetus or child.

The California case, *Bell versus Macy's, Inc.* (28), involved a pregnant female employee who suffered a ruptured uterus at work. Her condition was not recognized by the employer's medical personnel, who delayed in calling an ambulance. As a result, the fetus was harmed and born with serious disabilities, and later died as a result of his prenatal injuries. A tort action based on employer negligence in failing to provide emergency medical assistance

promptly, which might have avoided the fetal injuries, was rejected by an intermediate appellate court.

While various options were available to the court to permit recovery, the court held that workers' compensation was the mother's exclusive remedy, meaning that it was her only basis for recovery. Since the fetus had been a part of the mother's body at the time of injury, the Court reasoned that workers' compensation should provide the exclusive remedy for the child's prenatal injuries as well. The court recognized that, because workers' compensation provided no remedy for this injury, the child's prenatal injuries would not be compensated at all.

The court noted, but did not rely on, cases in which employers had excluded fertile women from employment, or required them to be sterilized, and observed that any result other than the one reached would have encouraged employers to bar fertile women from employment. While this concern for women's employment opportunities is laudable, the court's observation and decision deserve criticism on several points. First, while it is true that if employers have additional obligations to women workers, there may be some inducement not to hire them, the tort law experience indicates that employers may be equally vulnerable to the offspring of males negligently exposed to toxicants. Since any decision permitting recovery by the child of a worker would also apply in cases involving claims alleging paternal preconception injuries leading to fetal and postnatal harm, the impact of the rule would not be confined to women. Indeed, the court could have made this point clear in its opinion.

Second, the better result by far would be a rule that discourages employer negligence and therefore averts avoidable tragedies like the one that occurred in this case. The court's decision will have the opposite result by exculpating employers who fail to observe an appropriate duty of care and thereby cause predictable and avoidable injury. Finally, the concern expressed by the court has been better answered by the Supreme Court, which held that an employer who refuses to hire a woman, ostensibly because of fear of liability for prenatal injuries, will be liable for sex discrimination, a violation that will now subject employers to liability for damages (21).

In *UAW versus Johnson Controls*, the Supreme Court, unlike the California court, recognized the value in the general rule that employers who knowingly or negligently cause fetal harm face potential tort liability. The Supreme Court's decision expressly recognizes that different legal constraints operate together to induce employers to act in socially responsible ways, and the applicability of tort law principles assures to some extent that women will not be negligently or knowingly exposed to fetal hazards at work. Even if some employers try to shift this responsibility onto female workers or their doctors, these efforts can be resisted, and tort remedies offer one option. Together, the legal obligations imposed by tort law, antidiscrimination law, and health and safety laws logically require women to be hired and employers to insure their safety.

The California court upset this balance, but its conclusions and concerns merit attention, although for different reasons than the court stated, as evidenced by the solution

reached by other courts. In Louisiana, for example, the opposite result was reached, but the court based its decision to permit recovery for wrongful death of the fetus on state law providing that a fetus is a person from the moment of conception (65). This doctrine is most often invoked to restrict women's access to abortion but had the ironic side effect here, and in other cases, of permitting recovery in fetal injury cases. Thus, prosecutors around the country have charged pregnant women with prenatal child abuse and other crimes for the act of taking drugs or drinking alcohol during pregnancy (66). Almost all of these prosecutions rely on the theory that the fetus is entitled to protection, under civil and criminal law, from the wrongful acts of others that cause fetal harm. The prosecutors in such cases assert that there is no distinction in the law between situations in which an outside agent inflicts injury on a pregnant woman, causing fetal harm in the process, and those in which the woman herself engages in allegedly harmful conduct. The same principle creates the potential that women can be held liable in civil law for damages (to later-born children or even to a spouse in cases of fetal death) if they engage in negligent conduct resulting in fetal injury or death. At least one court has upheld the right of a child to sue his mother for taking the drug tetracycline during pregnancy, resulting in tooth staining in the child (67).

These cases demonstrate how creating rights to compensation for fetal injury, when the entitlement belongs to the fetus or later-born child (as opposed to a right of the parent to be free of injury that affects reproduction), permits a personification of the fetus and creates precedents that can be used to restrict and control the conduct of pregnant women. While distinctions can surely be drawn between the acts a woman does to herself and the acts that are done to her by another, the principle that the fetus has a right to recover for injuries makes it more difficult logically to carve out exceptions based on who inflicts the injury. The creation of legally cognizable rights of the fetus implies a corresponding duty of care, a concept that is most readily applied to the pregnant woman in whose body the fetus resides. The right to recover for fetal injury is thus a double-edged sword.

Efforts to create remedies for reproductive injury must navigate these shoals with caution. Governor Peter Wilson of California proposed to remedy the problem created by the decision in *Bell versus Macy's* by permitting employers to bar pregnant women from hazardous jobs (68,69). This proposal would be illegal as to employees covered by Title VII under *UAW versus Johnson Controls*, because state law cannot undermine the protections of a federal statute. It is also of questionable efficacy because it offers employers no incentive to improve workplace conditions, and because it leaves unaddressed the problems that result from maternal unemployment, such as poverty and loss of health insurance.

A better approach would be to remedy the inadequacies in the workers' compensation system with regard to reproductive injuries comprehensively and permit both male and female workers to bring tort suits for reproductive injuries resulting from employer negligence. Suits by



adults to compensate for the infliction of injury to reproductive health or functioning could include a claim for all consequential damages, including damages for the effects of such injuries on a spouse, fetus, or child. While this approach would begin to recognize the legitimate needs of workers for an appropriate level of protection and for remedies when the employer has not observed the appropriate duty of care, even more far-reaching reforms are needed to address the inapplicability of the tort law system to this type of injury. New formulations of the causation requirement, based on probabilistic projections or other modifications, and revisions of statutes of limitations would go a long way toward checking negligent conduct in this area and toward providing compensation to needy and worthy victims of employer negligence.

## Conclusion

It has not been the objective of this article to discuss fully and in detail each of the several legal strategies that will have to be developed and implemented to provide working men and women and their families protection from reproductive and developmental health hazards in the workplace. Many of the recommendations in the article are based on state law, including the general law of torts, wrongful discharge, unemployment insurance, and workers' compensation. Because these laws vary from state to state, a more comprehensive discussion of the recommended strategies would require a thorough analysis of laws in each state, their relative strengths, and a careful evaluation of how most effectively to establish useful precedent. Similarly, a more complete discussion of the OSHA strategies would require an examination of that agency's current resources and its commitment to health issues, as well as a detailed analysis of the proposed OSHA reform legislation.

In this paper, we sought to suggest an overall strategy and guiding principles for workers and their representatives, corporate directors, and policy makers who are committed to the effort to achieve reproductive and developmental health in the workplace. We also wanted to flag the basic legal rights at stake and to identify for workers the kinds of steps that they will need to take to preserve their rights. We hope that our comments will promote more discussion of these issues in corporate headquarters and that they will help stimulate a voluntary program for workplace reform. In summary, this is intended to be the beginning of the dialogue and discussion, not the end.

The authors thank Maureen Paul and Sabrina Kurtz for their work in organizing the conference at which this paper was first presented. We also thank the conference participants who attended the legal, policy, and labor workshops and whose comments and suggestions were invaluable. We are particularly grateful to Nancy Lessin, Frank Mirer, and the other labor representatives who, in addition to everything else, kept reality in our discussions through their accounts of the day-to-day experiences of workers.

## REFERENCES

1. *International Union (UAW) versus Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).
2. Anonymous. Fetal Protection in the Workplace (Editorial). Washington Post, March 22, 1991, p. A24.
3. Anonymous. Spotting sex bias on the job (Editorial). New York Times, March 22, 1991, p. A32.
4. Anonymous. Vindicating women's job rights (Editorial). Chicago Tribune, March 24, 1991, section 4, p. 2.
5. Rosen, R. What feminist victory in the court? New York Times, April 1, 1991, p. A17.
6. Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq.
7. Occupational Safety and Health Act, 29 U.S.C. 651 et seq.
8. *Wright versus Olin Corporation*, 697 F.2d 1172 (4th Cir. 1982).
9. *Zuniga versus Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982).
10. *Hayes versus Shelby Memorial Hospital*, 762 F.2d 1543 (11th Cir. 1984).
11. *Grant versus General Motors Corporation*, 908 F.2d 1303 (6th Cir. 1990).
12. *International Union (UAW) versus Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989).
13. *Johnson Controls versus Fair Employment and Housing Commission*, 218 Cal. App. 3d 517 (1990).
14. EEOC. Policy Guidance on *United Auto Workers versus Johnson Controls, Inc.* Equal Employment Opportunity Commission, Washington, DC, 1990.
15. U.S. Congress, House Committee on Education and Labor. Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980's. 101st Congress, 2nd Session, 1990.
16. U.S. Department of Health and Human Services, Centers for Disease Control. Leading work-related diseases and injuries—United States. MMWR 34: 537-544 (1985).
17. Becker, M. From *Muller versus Oregon* to fetal vulnerability policies. U. Chicago Law Rev. 53: 1219 (1986).
18. Paul, M., Daniels, C., and Rosofsky, R. Corporate response to reproductive hazards in the workplace: results of the Family, Work, and Health Survey. Am. J. Ind. Med. 16: 267-280 (1989).
19. Bergmann, B. R. The Economic Emergence of Women. Basic Books, Inc., New York, 1986, p. 67.
20. Occupational Safety and Health Administration. Preamble to the Lead Standard. Fed Reg 52: 952-960 (1978).
21. Civil Rights Act of 1991, Pub. L. 102-166 (Nov. 21, 1991).
22. *Dothard versus Rawlinson*, 443 U.S. 321 (1977).
23. *Western Air Lines, Inc. versus Criswell*, 472 U.S. 400 (1985).
24. *American Cyanamid Co.*, 9 OSH Cas (BNA) 1596 (1981).
25. *Oil, Chemical and Atomic Workers International Union versus American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984).
26. Office of the Federal Register. Occupational Safety and Health Standards. Subpart Z: Toxic and Hazardous Substances—Lead. 29 CFR 1910.1025. National Archives and Records Administration, Washington, DC, 1989.
27. *United Steelworkers of America versus Marshall*, 647 F.2d 1189, 1228-34 (D.C. Cir. 1980).
28. *Bell versus Macy's, Inc.* 261 Cal Rptr 447 (1989).
29. *Los Angeles Department of Water and Power versus Manhart*, 435 U.S. 702, 707 (1978).
30. *California Federal Savings and Loan Association versus Guerra*, 479 U.S. 272, 289 (1987).
31. *King versus Trans World Airlines, Inc.*, 738 F.2d 255 (8th Cir. 1984).
32. *EEOC versus Metal Service Company*, 892 F.2d 341 (3rd Cir. 1990).
33. Americans with Disabilities Act, 42 U.S.C. 12101-12213 (1990).
34. *Meritor Savings Bank, FSB versus Vinson et al.*, 477 U.S. 57 (1986).
35. Rao, K. S. Protecting the unborn: Dow's experience. Occup Health Safety 53: 57-61 (1981).
36. AMA. Guides to the Evaluation of Permanent Impairment, 3rd ed. American Medical Association, Chicago, 1990.
37. *Industrial Union Department versus Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).
38. *Long Beach Container Terminal, Inc. versus OSHRC*, 811 F.2d 477 (9th Cir. 1987).
39. Exide Corporation. Human Resources Policies and Procedures: Reproductive and Fetal Hazards. Exide Corporation, Reading, PA, 1991.
40. Johnson Controls, Inc. Draft Fetal Protection Counseling Program. Johnson Controls, Inc., Milwaukee, 1991.
41. *Heckler versus Chaney*, 470 U.S. 821 (1985).



42. *Adams versus Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).
43. *Souder versus Brennan*, 367 F.Supp. 810 (D.D.C. 1973).
44. *Dunlop versus Bachowski*, 421 U.S. 560 (1975).
45. Restatement of Contracts (Second), 195 (1979).
46. Prosser and Keeton on Torts, 5th edition (1988).
47. *Jacobs versus Pennsylvania R.R.*, 203 F.2d 290 (6th Cir. 1953).
48. *Palmateer versus International Harvester Co.*, 85 2d 124. 421 N.E. 2d 876 (1981).
49. *Building and Construction Trades Department versus Secretary of Labor*, 838 F.2d 1258 (D.C. Cir. 1988).
50. *Auto Workers versus OSHA*, 878 F.2d 389 (D.C. Cir. 1989, reh. den., 878 F.2d 401).
51. U.S. GAO. Reproductive and Developmental Toxicants: Regulatory Actions Provide Uncertain Protection. U.S. General Accounting Office, Washington, DC, 1991.
52. *International Union (UAW) versus General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir. 1987).
53. EEOC Charge of Discrimination, filed by Donald Penney against Johnson Controls, Inc., April 10, 1984.
54. *Pond versus Oliver*, 490 N.Y.S. 2d 358 (1985).
55. *In re Caryn J. Seigel*, Case No. SJ-DV-33998-0001 (December 23, 1991).
56. Radford, M. F. Wimberly and beyond: analyzing the refusal to award unemployment compensation to women who terminate prior employment due to pregnancy. NY Univ. Law Rev. 63: 532 (1988).
57. Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq.
58. Stumberg, R., Eber G., and Steinschneider, J. State Legislative Sourcebook on Family and Medical Leave. The National Center for Policy Alternatives, Washington, DC, 1989.
59. Larson, A. *Workers' Compensation Law: Cases, Materials, and Text*. Matthew Bender and Company, New York, 1984, p. 518.
60. *Millison versus E.I. DuPont De Nemours and Co.*, 101 NJ 161, 501 A 2d 505 (NJ Sup. Ct. 1985).
61. *Blakenship versus Cincinnati Milacron Chemicals*, 69 Ohio Street 608, 433 N.E. 2d 572 (Ohio Sup. Ct. 1982).
62. *Jarvis versus Providence Hospital*, 444 N.W. 2d 236 (Mich. App. 1989).
63. *Witty versus American General Capitol Distributors*, 697 S.W. 2d 636 (Tex App 1st Div. 1985).
64. *Security National Bank versus Chloride, Inc.* 602 F. Supp 294 (D. Kan. 1985).
65. *Adams versus Denny's*, 464 So. 2d 876 (La. App. 1985).
66. Bertin, J. Feminist jurisprudence. The 1990 Myra Bradwell Day Panel. 1 Column. J. Gender Law 40 (1991).
67. *Grodin versus Grodin*, 102 Mich App. 396, 301 N.W. 2d 869 (1980).
68. Governor Peter Wilson's Veto Message of California Assembly Bill No. 489, October 13, 1991.
69. Anonymous. Controversy over Wilson's fetal hazards bill (Editorial). Los Angeles Times, October 18, 1991, p. D1.